

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,673

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Appeal of)

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INTRODUCTION

The petitioners appeal the decision by the Department of Social and Rehabilitation Services (SRS) "substantiating" a report of child sexual abuse against their son, and seek to have that report expunged from SRS records. The issue is whether a preponderance of evidence establishes that the petitioners' son sexually abused the child in question.

FINDINGS OF FACT

On December 3, 1992, SRS received a report from a high school guidance counselor that a girl in the eighth grade at that school had alleged that an eighth-grade boy, the petitioners' son, had forcibly touched her in a sexual manner. An SRS investigator and a local police officer, both experienced in investigating reports of child abuse, interviewed the girl at the school.

The girl told them that the boy, whom she considered a friend, had forcibly dragged her into the boys locker room when they were alone in the gym and had put his hand down the front of her pants. The police officer (but not the SRS investigator) then interviewed the boy at his home. The boy confirmed being alone with the girl in the gym, but he denied anything had happened.

Both the police officer and the SRS investigator concluded that the girl was telling the truth; and SRS "substantiated" the report as one of child sexual abuse. The petitioners' son was suspended from school for one day, but no criminal charges were filed against him, and no further action was taken by SRS. At the time, neither the boy nor his mother (the mother was not married then to the boy's present stepfather, see infra) appealed SRS's decision.

The matter did not arise again until summer, 1995, when the petitioners were denied a foster care license by SRS due to their son being in the SRS child abuse registry. At this time the petitioners' requested that the report of abuse be expunged. At the hearing (held on November 14, 1995) the petitioners made clear

that they were appealing only SRS's denial of an expungement, not the denial of their application for a foster home license.

Both the alleged victim and the petitioners' son (who are now both seventeen) testified at the hearing. The girl testified that at the time she and the petitioners' son were friends, but that just prior to the incident her boyfriend and the petitioners' son had been involved in a fight. She stated that during the school lunch period she and the petitioners' son were assigned to monitor the gym to make sure that no other students went in there. She said that while they were alone in the gym the petitioners' son started tickling her, but that the situation soon escalated to where he grabbed her and forced her into the boys locker room. Once in there, while still restraining her, he forced his hand down the front of her pants onto her pubic region, but not penetrating her. She stated that she broke away by getting the petitioners' son to believe that someone else was in the locker room, and that she ran down the hall to the office where she had previously been working.

The girl further testified that she was frightened and upset by the incident but did not report it to school authorities. That night, however, she stated that she got into an argument with her mother about being withdrawn and not doing her chores, and blurted out to her mother why she was so upset. The girl's mother called the school, and the next day, after talking with the girl, the school guidance counselor reported the incident to SRS.

In their testimony, the police officer and the SRS investigator who had interviewed the girl at that time noted that the girl has been consistent about her description of the incident, except for the fact that at the time of the investigation the girl had also alleged that the petitioners' son had forced her to place her hand on his crotch, which, at the hearing, she testified did not occur. The police officer testified at the hearing that although he believed the girl's version of the event, and that she wasn't a willing participant in it, he considered the incident to have been no more than adolescent "grab-ass behavior" that had gotten out of hand, and which he believes the school handled appropriately--and that, as a result, he had not recommended that criminal charges be brought against the petitioners' son.

The petitioners' son testified that the girl made up the incident, apparently because he and the girl's boyfriend had been in a fight, and the girl had made an allusion to some kind of "payback". He also stated that after the incident, the girl had remained friendly with him.

Both the girl and the petitioners' son struck the hearing officer as "good kids", and it is difficult to credit the testimony of one of them over the other. However, based on their demeanor at the hearing, and the circumstances under which the incident was first reported, and then testified to at the hearing, the hearing officer finds it highly improbable that the girl would have made up the incident and continued to lie about it three years later.

The girl's testimony was candid and straightforward. She admitted that her memory might not be completely accurate as to all the details surrounding what happened, but there is no indication whatsoever that she bore any grudge against the petitioners' son, then or now, that would account for her continuing to fabricate the charges. If anything, it appears that from the outset she has been reluctant to come forward with her allegations.

The petitioners' son, on the other hand was a laconic, if also somewhat reluctant, witness. Although he placed much emphasis on the fact that he had been in a fight with the girl's boyfriend, this would appear to have given him as much of a motive at the time to commit an assault on the girl as it would have

given the girl to fabricate it. Under the circumstances, the hearing officer is unable to credit the petitioners' son's total denial that such an incident took place.

It appears that the impetus for the appeal in this matter was primarily the boy's stepfather, who was not even living with the boy at the time of the incident. The stepfather placed much emphasis on the girl's continuing friendly relationship with the boy after the incident. In the hearing officer's view, however, this only enhances the girl's credibility--i.e., the fact that she bears the petitioners' son no continuing ill-will gives her no motivation to lie.

The petitioners also placed emphasis on the fact that the gym is in close proximity to the school offices, and that the girl didn't cry out for help. Considering the girl's testimony, however, that the situation happened relatively quickly, escalating rapidly from what-started-out-as-being-seemingly-innocent playfulness, the hearing officer does not find it inconsistent that nobody else saw what was happening and that the girl did not call for help before breaking free and fleeing.

Also weighing against the boy's credibility is the appearance that until some secondary gain (a foster home license) became dependent on refuting the incident, for three years the family was not motivated to appeal SRS's substantiation of the girl's allegations.

ORDER

SRS' decision that the report of sexual abuse by the petitioners' son is substantiated is affirmed, and the petitioners' request that the record containing this matter be expunged from the Department's registry is denied.

REASONS

The petitioners have made application for an order expunging the record of the alleged incident of child abuse from the SRS registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

(a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 4915 of this Title unless the commissioner or the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be destroyed.

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(h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under Section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Pursuant to this statute, the department has the burden of establishing that a record containing a finding of child abuse should not be expunged. The Department has the burden of demonstrating by a

preponderance of the evidence introduced at the hearing that a child has been abused or neglected. 33 V.S.A. § 4912(10); .

"Sexual abuse" is specifically defined by 33 V.S.A. § 4912 as follows:

(8) "Sexual abuse" consists of any act by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

In this matter, as is most often the case, there were no witnesses to the alleged abuse and no physical evidence, and the Department's case rests solely on the credibility of the alleged victim. The Board has often acknowledged that in such circumstances only two individuals, the alleged perpetrator and victim, will ever know for certain if the incident occurred. In such cases, however, if the alleged victim's allegations are deemed to be credible, and those allegations are deemed to constitute sexual abuse, the Department's decision must be affirmed.

In cases such as this, however, in which the alleged perpetrator of child sexual abuse is also a minor, SRS policies appear to allow the Department to differentiate between sexual "exploration" and actual "sexual abuse". See SRS Manual § 1215. "Exploration", however, must be mutual. In cases in which "force, coercion, or threat" is used by one child against another, the incident cannot be treated as one involving mutual "exploration". See Fair Hearing No. 8810.

In this case there is no evidence either that the girl encouraged or consented to the act in question, or that the petitioners' son was not of sufficient age or maturity to recognize that such an act was abusive. As found above, the petitioner's son forcibly coerced the girl into the locker room and deliberately put his hand into her pants and touched her genitals. Therefore, it cannot be concluded that this was a case of "exploration". Even in the context of what-might-not-be-uncommon adolescent behavior, however, such an act clearly meets the definition of sexual abuse under § 4912(8), supra.

Although the petitioners dispute the veracity of the girl's allegations, they argue that even if the incident occurred as she described, the matter has been "blown out of proportion" by SRS, and their son has been unfairly "branded for life" by having his name placed in the SRS registry. The hearing officer is not unsympathetic to this position. It appears from the evidence and the son's demeanor that, at worst, this was an uncharacteristic and isolated action on the son's part. Under the statute, however, because of this one incident, committed against a peer when he was fourteen years old, he will remain in the SRS registry for life, and probably will be unable to ever secure employment in a field involving work with children.

Be this as it may, the Vermont Supreme Court, in upholding a prior decision by the Human Services Board (Fair Hearing No. 11,766) involving a child "perpetrator", recently held that the SRS child abuse statutes must be read as allowing this result. In re Selivonik, Vt. Supreme Court Dkt. No. 94-170 (Nov. 17, 1995). In that case the Court noted the "irony" that child perpetrators placed in the SRS registry are subjected to greater "stigma" in adulthood than they would be if they had been adjudicated "delinquents" in juvenile court (by statute, all records of juvenile delinquents are sealed when the juvenile reaches age eighteen); but it ruled that such a "seemingly contradictory" result can only be addressed by the

legislature. In the face of this ruling it is clear that the Board, even if it were inclined to do so, does not have the legal authority to expunge the petitioners' son's name from the registry unless it finds that the incident, itself, did not occur.

However, inasmuch as a preponderance of evidence does establish that the petitioners' son forcibly and deliberately touched the girl in a lascivious manner, it must be concluded that the finding of child sexual abuse against him is substantiated; and the petitioners' request to have the report of the incident expunged from the SRS registry must be denied.

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